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Docket No. 81-2332

IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

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QUESTION PRESENTED

Whether a public utility is a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq., when it seeks reimbursement for the cost of removing its distribution facilities from public rights-of-way in the execution of an urban renewal project funded in part by grants from the United States Department of Housing and Urban Development.

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BRIEF OF THE CITY OF NEW YORK, AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The City of New York is the most populous municipality in the nation and, as would be

expected of a city of its age and size, has engaged in numerous urban redevelopment programs to upgrade blighted or underdeveloped areas within its borders. The acquisition of properties for such programs has been made by the City, through its Department of Housing Preservation and Development. Like other municipalities, New York has relied on federal financial assistance to enable it to carry out such programs.

The subject litigation concerns the relocation of the respondent utility's distribution facilities located in streets which were closed to facilitate the development of urban renewal projects. The adjoining land had been acquired by the petitioner development authority, and the respondent utility seeks relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 ("Relocation Act"), 42 U.S.C., §4601, et seq. The Court of Appeals for the Fourth Circuit reversed the District Court and held that the respondent is

entitled to relocation benefits for most if not all of its removed facilities.

Since the effective date of the Relocation Act (January 2, 1971), almost 100 blocks of New York City streets have been closed in connection with the acquisition of land by the City for 28 urban renewal projects; subsequent development on such closed streets has resulted in the relocation or disconnection of the utility lines in the great majority of those closed streets. There remain more than 100 blocks of City streets which have been closed or which will be closed in the future in which it may be necessary that the utility facilities be relocated. All of these projects, accomplished with federal assistance, implicate the Relocation Act.

Although there have been almost no claims by New York City utilities for relocation benefits since the passage of the Relocation Act, an affirmance by this Court would alter that situation. In a time of curtailed federal

assistance to the States and their subdivisions, a holding that utilities such as respondent are entitled to benefits under the Relocation Act can only serve to further limit the federal funds available for urban redevelopment. Accordingly, the City of New York submits this brief as amicus curiae in support of petitioner's request for reversal.

SUMMARY OF ARGUMENT

We urge in our argument that respondent Chesapeake and Potomac Telephone Co. of Virginia is not entitled to benefits under the Relocation Act because Congress did not intend that a utility, forced to relocate its facilities in connection with an urban renewal project, be encompassed within the term "displaced person" as that term is defined under the Relocation Act. In support of that argument, we show that (1) under the common law of New York and the states across the nation, a utility franchise in the public streets is subject to the public necessity and

convenience, and the expense of relocating its facilities to conform to the public necessity and convenience must be borne by the utility; (2) the extensive legislative history of the Relocation Act is bereft of any indication that Congress was concerned with the effects of governmental takings on the facilities of utlities, or that the utilities themselves felt that they needed or were entitled to benefits under the Relocation Act; and (3), courts other than the Court of Appeals for the Fourth Circuit, in considering a utility's right to relocation benefits under the Relocation Act, have uniformly denied them in situations akin to the subject litigation.

ARGUMENT

THE DETERMINATION OF THE COURT OF APPEALS THAT A UTILITY COMPANY WHOSE DISTRIBUTION FACILITIES IN THE PUBLIC STREETS WERE REMOVED AS THE RESULT OF AN URBAN RENEWAL PROJECT CAN QUALIFY AS A "DISPLACED PERSON" UNDER THE UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT, 42 U.S.C. §4601 et seq., IS INCONSISTENT WITH THE LEGISLATIVE PURPOSE OF THAT ACT.

(1)

The Court of Appeals, after minimal legal analysis and only the most cursory consideration of the legislative history of the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Relocation Act"), 42 U.S.C., §4601, et seq., held that a utility company that has been required to move certain of its in-street facilities, may constitute a "displaced person" as that term is defined in 42 U.S.C. §4601 and be entitled to payments under the Relocation

Act. [1] It is submitted that this decision is inconsistent with the Congressional purpose in passing the Relocation Act and will provide to utility companies a windfall never intended or contemplated by Congress.

Under the common law of New York, the State, or its political subdivisions, is not required to reimburse a utility when, acting in its governmental capacity, it has forced the utility company to relocate its facilities in the streets. The principle that the utility company must relocate its facilities at its own cost has been reaffirmed by the New York Court of Appeals in two cases involving the condemnation of property for urban renewal purposes. Matter of Cons. Edison Co. v. Lindsay, 24 NY2d 309, 300 N.Y.S. 2d 321, 248 N.E. 2d 150 (1969) (utility company required to bear the cost of relocating its facilities where land was condemned

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1. The decision of the Court of Appeals is reported at 674 F.2d 298.

for urban renewal project and for construction of a school); N.Y. Tel. Co. v. City of Binghamton, 18 NY2d 152, 272 N.Y.S. 2d 359, 219 N.E. 2d 184 (1966) (telephone company not entitled to reimbursement for the expense of relocating its telephone lines and other facilities where street was closed for use as part of a housing project). The rationale underlying these decisions was clearly set out in Transit Comm. v. Long Is. R.R. Co., 253 N.Y. 345, 171 N.E. 565 (1930), wherein, pursuant to state statute, a railroad grade crossing was to be eliminated with the necessary result that a gas main would have to be removed and relocated. The Court of Appeals held that the cost must be borne by the gas company, stating (253 NY at 351, 171 N.E. at 566):

> The Gas Company has received from the public authorities its franchise or privilege to lay and maintain its gas main under the surface of the public street. Without this grant from the people it has no rights in the highway. This privilege, or franchise, is at all times subject to the police power of the State; in other words, the company maintains its pipes subject to

> the obligation to remove them whenever the public health or safety require this to be done. Although authorized to lay its pipes in the public streets, the company takes the risk of their location and is bound to make such changes as the public convenience and security require, at its own cost and charge.

Likewise, under the common law of jurisdictions across the country, a utility's franchise in the streets is subject to the police power, and the utility must bear the expense where public convenience or security require the relocation of its facilities. 12 McQuillen, Municipal Corporations, §34.74a; see, e.g., Mountain State Telephone and Telegraph Co. v. Boise Development Agency, 101 Idaho 30, 607 P.2d 1084 (1980); Connecticut Railway & Lighting Co. v. New Britain Redevelopment Comm., 161 Conn. 234, 287 A.2d 362, 365 (1971); Pacific Telephone and Telegraph Company v. Redev. Agency of Glendale, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68, 69 (Ct. App., 1978).

Accordingly, the decision of the Court of Appeals, when considered in light of the common law doctrine that a utility must bear the cost of relocating its facilities, and the legislative history and purpose of the Relocation Act, is clearly wrong and must be reversed.

(2)

This Court has considered the legislative history of the Relocation Act in Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39 (1979), where this Court limited the definition of "displaced person" in 42 U.S.C. §4601(6)[2] to persons dislocated as the result of the acquisition or contemplated acquisition of real property for a federal or federally assisted program. As this Court noted (supra, at 49), the Relocation Act essentially grew out of a lengthy report completed in 1964 by

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2. 42 U.S.C., §4601(6) provides:

> The term "displaced person" means any person who, on or after January 2,

the Select Subcommittee on Real Property Acquisition of the House Public Works Committee.[3] In that study, which called for the standardization of federal relocation benefits, the Subcommittee took special note of

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(footnote 2 continued)

1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project.

3. Select Subcommittee on Real Property Acquisition of the House Committee on Public Works, Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, 88th Cong., 2d Sess. (Comm. Print 1965) (hereinafter "Select Subcommittee Study").

the tremendous impact of property acquisition for federal and federally assisted programs on low income families who occupied the majority of the dwelling units acquired under urban renewal programs and constituted many of the families displaced by federally assisted highway programs. Select Subcommittee Study, pp. 21-22. In discussing displaced businesses, the report similarly focused on the problems of small, often tenant-occupied businesses who provided services to the local community; such small businesses were least able to withstand displacement and, in the case of tenant-occupied businesses, were, according to the Study, non-compensable under the laws of Eminent Domain. Ibid., pp. 26-27, 31-33, 107. In contrast, the report made no mention of the problems of utility companies whose facilities are frequently disturbed by federally assisted takings, and in instances where the various types of businesses affected by a taking are described

in the study, no mention is made of utility facilities. Ibid., pp. 474-475.

In 1965, hearings were held before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, on proposed real estate acquisition and relocation legislation.[4] At the Senate hearings, testimony on the need for such legislation was given by representatives of various interested groups. For example, testimony was given by a representative of the National Federation of Independent Business, an association of small independent businessman. Senate Hearings, pp. 96-98. A statement was made on behalf of the Boston Redevelopment Authority. Ibid., pp. 189-91. Statements were also made on behalf

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4. Hearings on S. 1201 and S. 1681 before the Subcommittee on Intergovernmental Operations, 89th Cong., 1st Sess. (1965) (hereinafter, "Senate Hearings").

of the National Association for the Advancement of Colored People and the American Farm Bureau Federation. Ibid., pp. 236-240, 298-303. Communications were received from the National Association of Home Builders, the National Forest Products Association, the Eastern Baking Co., Inc. and the Austin-Hastings Co., Inc., the last being the owner of warehouses which were to be taken for a NASA site. Ibid., pp. 304-318. In other words, the various segments of the nation affected by government takings made public their position on the proposed legislation. However, there was no mention during those hearings of the needs of public utilities, and no public utility bothered to submit any communication to the subcommittee.

In February 1969, extensive hearings were held before the Senate Subcommittee on Intergovernmental Relations on S.1, the Senate bill which was referred to the House and, as amended by that

body, became the Relocation Act.[5] Again, at the 1969 Senate hearings, statements were made by, and communications received from, representatives of various segments of the nation interested in the proposed legislation, including, inter alia, the National Business League, the Outdoor Advertising Association of America, the American Farm Bureau and the National Federation of Independent Business. Ibid. pp. 157-159, 185-195, 263-266. Again, no communication was made on behalf of any public utility, nor was any mention made of the problems of utilities.

Similarly, at hearings in 1969 and 1970 held before the House Committee on Public Works, statements and comments by parties interested in

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5. Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 1st Sess. (1969) (hereinafter "1969 Senate hearings").

S.1 and related House bills were received.[6] Again there was no comment by utilities on the need for such legislation.

The Relocation Act, 42 U.S.C., §4601 et seq., passed in 1970, provides a number of remedies for a displaced person as that term is defined in the Act. Such benefits are obviously intended to assist displaced residential or business occupants of the property to be acquired, rather than utilities whose facilities must be removed. Pursuant to 42 U.S.C., §4622, a displaced person may be entitled to the actual reasonable expenses of moving himself, his business, and his personal property, and the actual reasonable expense of searching for a replacement business; he can also be reimbursed for the actual direct loss of tangible personal property, but not to exceed the

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6. Uniform Relocation Assistance and Land Acquisitions Policies-1970; Hearings on H.R. 14898, H.R. 14899, S.1 and Related Bills before the House Committee on Public Works, 91st Cong., 1st and 2d Sess., 1969-1970.

cost of relocating such personalty. Furthermore, one displaced from a residence may elect, instead of such actual expenses, allowances of up to $500. 42 U.S.C., §4622(b). Similarly, one displaced from a place of business or from a farm operation may elect to receive, in lieu of actual expenses, a fixed payment equivalent to the annual earnings of the business, not less than $2500 and not more than $10,000, and only if the business cannot be relocated without a substantial loss of patronage and is not part of a chain-store operation. 42 U.S.C., §4622(c). The Act also provides for payments to displaced homeowners to enable them to purchase a new home (42 U.S.C., § 4623) and for payments to those otherwise lawfully occupying a dwelling to enable such a person to obtain suitable housing (42 U.S.C., § 4624), and in each case such payments may not exceed a maximum set out in the statute. Such remedies are made available so that there might be "fair and equitable treatment of . . . [displaced]. . .

persons . . . in order that . . . [they] . . . shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole". 42 U.S.C., §4621, "Declaration of policy".

(3)

It is submitted that in light of the legislative history and purpose of the Relocation Act, a utility whose distribution facilities in the public right-of-way are disturbed by the acquisition of real property is not a displaced person for purposes of the Act. While a liberal reading of the Relocation Act might appear to bring a utility like respondent Chesapeake and Potomac Telephone Co. within its coverage,[7]

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7. As noted by the Court of appeals, 674 F.2d at 300, "a business" is defined in 42 U.S.C., §4601(7) as "any lawful activity, excepting a farm operation, conducted primarily for: (A) the purchase, sale, lease, and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) the sale of services to the public. . . ."

it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers". Steelworkers v. Weber, 443 U.S. 193, 201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457 (1892). While the Relocation Act was intended to make uniform the various programs for those who are affected by federal and federally assisted projects, the legislative history and scheme of the Relocation Act also demonstrates that it was intended to aid those residential and business occupants of property acquired or proposed to be acquired for such programs who would otherwise suffer a disproportionate harm from what was intended as a public benefit. Congress did not express any concern for the effect of governmental acquisitions on utilities whose facilities in the public way have always been subject to removal for the public convenience and necessity. Considering the nature of utilities, whose lines and other

facilities frequently permeate entire geographical areas, and who are often monopolies whose rates are set by the respective state or political subdivision, it would appear that such entities would rarely suffer "disproportionate injuries" from governmental acquisitions.

While the Court of Appeals was correct in its observation that Congress intended that the Relocation Act grant benefits beyond those which are provided at common law, Congress in fact was mainly concerned with occupants of the land whose estates might be insufficient to entitle them to an award under the traditional laws of Eminent Domain, but who were nevertheless severely damaged by the taking of property; such interests would include tenant-owned businesses (see Select Subcommittee Study, pp. 27-31) and residential tenants at will (see H.R. Rep. No. 91-1656, reprinted at 1970 U.S. Code Cong. and Adm. News, p. 5850, 5861). Congress did not intend to extend benefits to public utilities whose limited right

to use the streets is itself subject to the public necessity and convenience and whose profits are protected by state law. In sum, utilities such as respondent are seeking a windfall.

Prior to the decision of the Court of Appeals, courts dealing with the right of a utility to relocation benefits under the Relocation Act in situations akin to the subject case had uniformly refused to find any such right. See Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir., 1980), aff'g 468 F. Supp. 375 (E.D. Mich., 1979); Artesian Water Co. v. State Dept. of Hwys. & Transp., 330 A.2d 432 (Del. Super. Ct., 1974), mod. on other grounds, 330 A. 2d 441 (Del., 1974); Lone Star Gas Co. v. Landrieu, No. 80-100-C (E.D.Okla., March 30, 1981); Public Service Co. of Oklahoma v. Harris, No. 79-C-37-BT (N.D. Okla., Aug. 22, 1980); Chesapeake and Potomac Telephone Co. of Virginia v. Landrieu, No. 81-1602 (E.D. Va., June 4, 1981) (the District Court opinion in this case); Mountain States Telephone & Telegraph Co. v. Boise Redevelopment

Agency, No. 52891 (Idaho Dist. Ct., Oct. 27, 1980), app. pending; See also, Pacific Telephone & Telegraph Co. v. Redevelopment Agency, supra, 87 Cal. App. 3d 296, 151 Cal. Rptr. 68, where a state relocation statute similar to the Relocation Act was held not to entitle a utility to payments for relocating its facilities in the absence of a specific provision therefore in the statute. While the decisions of these courts have pointed to different bases for holding the Relocation Act inapplicable,[8] the common thread joining all

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8. In Consumers Power Co. v. Costle, supra, both the District Court and the Court of Appeals found that the relocation of a utility's lines did not even constitute the acquisition of a property right necessary for application of the Relocation Act; see also, Lone Star Gas Co. v. Landieu, supra. In Artesian Water Co., supra, the Court held that the Relocation Act did not extend its coverage to utilities, and did not repeal 23 U.S.C., §123, which explicitly provides for reimbursement of legal, State payments for the relocation of utility facilities in connection with federally-aided highway construction.

these cases is the principle that, in light of the limited nature of a utility's right to place its facilities in the streets, relocation benefits should not be granted to a utility company forced to move such facilities in the absence of clear Congressional intent that they receive such benefits. See, e.g., Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, supra, No. 52891. Rather, as noted by the District Court in this case, the Congressional intent was to assist, inter alia, displaced businesses who must compete with other businesses not affected by governmental acquisition; it was not intended to assist public utilities who have a monopolistic franchise and whose rates are set by the State and may reflect any increased costs to them.

When Congress has intended that federal funds be used for the relocation of utility facilities, it has been quite explicit in stating so. Pursuant to 23 U.S.C., §123, Congress has provided

that where state funds are used to pay for the relocation of utility facilities in connection with federally assisted highway construction, federal funds can be used to reimburse the State for such payments, provided the payments are legal under state law. Furthermore, as pointed out in Artesian Water Co. v. State Dept. of Hwys. & Transp., supra, 330 A.2d at 438, the Relocation Act expressly repealed chapter 5 of Title 23 of the United States Code (Federal-Aid Highway Act of 1968, Public Law 90-495, Stat. 815, §30), itself a highway relocation assistance act which defined "displaced person" in a manner similar to the Relocation Act. However, 23 U.S.C., §123 was not so repealed, which underscores the different treatment afforded to utilities by Congress, and its intent to give them relocation assistance only where such assistance is specifically provided for in the relevant legislation. Similarly, in 1972, two years after passage of the Relocation Act, Congress passed the District of Columbia Public Utilities Reimbursement Act of 1972, which

explicitly provides for the reimbursement of the cost of relocating utility facilities in connection with urban renewal programs in the District of Columbia. Public Law 92-495, 86 Stat. 812. No such explicit provision for the reimbursement of utilities' relocation costs is present in the Relocation Act, and such reimbursement should not be required.

Accordingly, the legislative purpose and history of the Relocation Act, as well as its interpretation by the courts that have considered it, make clear that the respondent and other utilities whose facilities in the public way must be relocated in connection with urban renewal programs, are not entitled to benefits under the Relocation Act.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

Dated: New York, New York
April 1, 1983

Respectfully submitted,

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